

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CAROL GRAY, et al.,	*	Case No. 14-CV-2488 (MKB)
	*	
Plaintiffs,	*	Brooklyn, New York
	*	September 16, 2014
v.	*	
	*	
CITY OF NEW YORK, et al.,	*	
	*	
Defendants.	*	
	*	
* * * * *		

TRANSCRIPT OF CIVIL CAUSE FOR INITIAL CONFERENCE
BEFORE THE HONORABLE MARILYN D. GO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:	MICHAEL O. HUESTON, ESQ. 16 Court Street Suite 3301 Brooklyn, NY 11241
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For the Defendant, City of New York:	BRENDA ELAINE COOKE, ESQ. JOSEPH ANTHONY MARUTOLLO, ESQ. New York City Law Department 100 Church Street New York, NY 10007
For the Defendant, Sgt. Mourad:	ANTHONY DiFIORE, ESQ. The Quinn Law Firm 399 Knollwood Road, Suite 220 White Plains, NY 10603

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For the Defendant,
Police Officer Jovaniel
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1 (Proceedings commenced at 11:45 a.m.)

2 THE COURT: Grey vs. City of New York, docket no.
3 2014-CV-2488. Will counsel present please state their names
4 for the record. For the plaintiffs?

5 MR. HUESTON: Michael Hueston.

6 THE COURT: For the City defendants.

7 MS. COOKE: Brenda Cooke.

8 MR. MARUTOLLO: And Joseph Marutollo.

9 THE COURT: For Sargent Mourad.

10 MR. DiFIORE: Anthony DiFiore from The Quinn Law
11 Firm.

12 THE COURT: And for Officer Cordova.

13 MR. BURNS: John Burns, Worth, Longworth and London.
14 Good morning, Your Honor.

15 THE COURT: Good morning, all.

16 Before we were on -- went on the record we began
17 discussion of the scheduling order. And I thought it would be
18 wise, given that this is a more complex case, to have this
19 discussion recorded.

20 The parties have advised me that they have
21 ultimately agreed to a nine month fact discovery schedule and
22 so the discovery deadline for fact discovery will be June
23 16th.

24 Now we were in the process of discussing experts and
25 Mr. Hueston had mentioned that he may have a medical expert to

1 discuss the quality of the treatment provided by EMS and also
2 to support potential claims regarding a delay in the arrival
3 of EMS. Is that correct?

4 MR. HUESTON: Yes, Your Honor.

5 THE COURT: Okay. And you had another expert.

6 MR. HUESTON: That would be either -- I believe --
7 let me put it this way. Not crime scene but a police tactics
8 expert, Your Honor.

9 THE COURT: All right. And then Ms. Cooke had
10 indicated that while the City will -- is likely to have
11 rebuttal experts, the City may have its own --

12 MS. COOKE: Correct. Depending on the development
13 of the fact discovery and if there is -- of the plaintiff's
14 claims in the case, it might be that -- I could see that we
15 might need a forensic pathologist or a ballistics expert.

16 THE COURT: Okay. And defendants?

17 MR. DiFIORE: I don't see anything.

18 MR. BURNS: No, Your Honor. Nothing is anticipated.

19 MR. DUNLOP: Excuse my tardiness, Your Honor.

20 MR. HUESTON: We're on the record right now, so if
21 you could state your appearance --

22 MR. DUNLOP: Yes. Victor Dunlop, Dunlop and
23 Associates, PC, for the plaintiff, Carol Gray.

24 THE COURT: We'll hold future conferences in the
25 courtroom.

1 (Pause.)

2 THE COURT: Okay. I'm sorry. I got distracted.
3 What was just said?

4 MS. COOKE: Oh, I indicated we may have a
5 affirmative defendant's experts, ballistics, a forensic
6 pathologist possibly depending on the seriousness of the
7 plaintiff's claims in the case has been developed and the fact
8 discovery issues.

9 MR. DiFIORE: And, Your Honor, I don't think --
10 Anthony DiFiore for Sgt. Mourand. And I don't think we would
11 have anything beyond the City experts.

12 THE COURT: Okay. So I think it's still probably
13 premature to talk about experts, but -- I mean, to set an
14 expert schedule.

15 MR. DiFIORE: Agree.

16 MR. HUESTON: That's fair.

17 THE COURT: Although I do think, as I mentioned
18 before we went on the record, the City defendants, if they're
19 going to make an argument about a lack of special duty on the
20 part of EMS, might be in a position to make a motion sooner
21 rather than later so we don't get sidetracked by unnecessary
22 medical related discovery.

23 Obviously, there will be discovery regarding the
24 medical condition of the decedent. The whole issue of the
25 treatment could end up being somewhat complex.

1 And so I think what might make sense is perhaps five
2 months into the -- this case, we might just have to -- I'll
3 ask the parties to confer on experts to figure out where you
4 are.

5 MR. HUESTON: That's fine.

6 THE COURT: And that probably might be a good time
7 to see if it makes sense to start talking about settlement, or
8 do you think it makes sense to start talking earlier?

9 MS. COOKE: Your Honor, the City is always happy to
10 entertain discussions about settlement. I think that as we are
11 getting access to some of the documents and information in the
12 case it helps us evaluate the case a little bit better.

13 THE COURT: Okay.

14 MS. COOKE: So at this point I mean the IME
15 investigation just closed and we need to get access to that.
16 That file will be hugely helpful for all parties.

17 And so I think a little bit more time I think for
18 both sides may be necessary.

19 THE COURT: Okay.

20 MS. COOKE: Certainly that could happen within five
21 months.

22 MR. HUESTON: I agree with that, Your Honor.

23 THE COURT: Okay. Well, we'll have two things that
24 you need to file a report on. One is the status of expert --
25 we could actually set a shorter time for a report on

1 settlement, if you think it would be useful. If not, I'm happy
2 to wait five months. I don't want to be in the business of
3 reading these reports and making you write reports that are
4 unnecessary.

5 MR. HUESTON: I think what's going to -- I guess
6 the main issue is when are we going to get the -- there's
7 several reports that I think are the most important and I'll
8 just state them so that Your Honor has an understanding.

9 There's a crime scene unit case file we're waiting
10 for. The King's County District Attorney's Office
11 investigation file. The 67th Precinct Detective Squad
12 investigation file. The firearm discharge investigation
13 reports, nos. 13 through 17. And there's the IAB file
14 relating to the shooting.

15 I think we all are in agreement that those are very
16 important, critical files. And we spoke yesterday about the
17 timing on those.

18 So if we get them sooner than four months, I think
19 it would work. But if not, I think the five months is
20 probably the best way.

21 THE COURT: Okay. Well, you can surprise me and
22 send me an earlier report if you think you need to take
23 action.

24 I mean -- and certainly, I'm actually interested in
25 setting as tight an expert schedule and also addressing the

1 issue, the legal issue that the City might want to raise on
2 the EMS, because it's crazy to be spending money on experts to
3 discuss the negligence of the EMS if there is no basis -- no
4 realistic basis for liability.

5 MS. COOKE: We'll take a look at that, we have some
6 of the documents now, and we'll take a look at that sooner
7 rather than later and in our best effort in a preliminary way
8 if we think there's a basis to potentially move to dismiss
9 some of those claims, we'll confer with the plaintiffs and see
10 what they think in raising (inaudible).

11 THE COURT: Well, my suspicions are we'll hear from
12 you well before --

13 MS. COOKE: Yes. Your Honor, with respect to the
14 document items that Mr. Hueston just raised, some of those we
15 are getting. Some of those we do not yet have but have
16 requested, and some are -- for example, the Firearms Discharge
17 Review Board investigation is open, not yet complete and
18 therefore I don't yet have access to those documents.

19 But with respect to the -- for example, the crime
20 scene unit case file, which we are presently receiving pieces
21 of and I expect to be able to produce that probably in the
22 next few weeks for sure; the detective's file and the IAB file
23 hopefully we'll get those as well.

24 There's a concern -- and I raised this yesterday
25 with the counsel on the telephone conference we had, that we'd

1 like to enter into a confidentiality order with respect to
2 standard documents with respect to personnel disciplinary
3 files, investigative files like the IAB file, the detective's
4 file, the forthcoming district attorney's file.

5 But in particular, in addition to a protection of
6 confidentiality over those designated materials, we'd like an
7 attorney's eyes only protection over the identity and personal
8 information of the witnesses identified in those investigation
9 files, because we have a concern of law enforcement privilege
10 with respect to that particular information of the identity of
11 those witnesses and their personal information, and the
12 endangering of those witnesses, the likelihood that it would
13 impair our ability to further investigations, but recognizing
14 the need of the parties to access -- for the attorneys to
15 access those witnesses and gather information.

16 I think interest would all be best served if we
17 could just protect them with an attorneys only stipulation
18 over that information.

19 MR. HUESTON: Your Honor, my response here is in
20 two parts. I'm not -- it's hard for me to directly respond,
21 because I don't know the particulars. But in general I'll say
22 this.

23 In terms of the law enforcement privilege it hasn't
24 been articulated to me what law enforcement investigations are
25 ongoing, frankly speaking, now that -- so I don't --

1 THE COURT: Yes. I think it's probably premature to
2 talk about this and you'll probably be in a better position in
3 a few months, once you have the documents, to know what's at
4 issue.

5 MS. COOKE: But as they get them, in order to
6 produce them, Your Honor, I would like to have the protection
7 in place prior to the production of those documents.

8 THE COURT: Right. I mean, to the extent you need to
9 fine tune it and add an attorney's eyes only protection, you
10 know, why don't you wait till you get those documents that you
11 think will require that sort of special treatment.

12 MS. COOKE: I expect that the -- for example, the
13 IAB investigation file, and the detective's investigation
14 files, contain the names and personal information and
15 statements of witnesses who participated in the law
16 enforcement investigation and the district attorney's
17 investigation, and those witnesses have made statements that
18 could in this case, Your Honor, endanger their safety and
19 their privacy is at risk.

20 We have here an incident -- there was a police
21 involved shooting and the plaintiff was known to law
22 enforcement to be a member of the Bloods gang and his existing
23 relatives, who remain, his mother and the sister are the
24 plaintiff's -- on his behalf is the estate in this case.
25 There are two brothers who are reputed, known to law

1 enforcement, violent gang members as well.

2 And so we have concerns about the privacy and
3 endangering those witnesses who have been interviewed and made
4 statements that -- some of which may be favorable to the
5 arguments that plaintiffs are making and some maybe not.

6 And the threat or the risk to them I think is worthy
7 of an attorney's eyes only protection over that information.
8 So that parties can use it, discovery and access those
9 individuals, but without the wholesale exposure of them to the
10 attorneys in this case.

11 MR. HUESTON: Your Honor, I do think it's premature
12 but what I'm hearing is that -- and maybe I'm wrong -- is that
13 they've seen these records. But it seems they're saying that
14 they are aware of statements contrary and in support --

15 MS. COOKE: Well, certainly in conversations with my
16 client, Your Honor, and individuals who have conducted the
17 investigation and it's closed at this point.

18 THE COURT: What might make sense is initially -- I
19 mean, it's the identity of these people you're worried about?

20 MS. COOKE: Yes, the identity and their telephone
21 numbers, their --

22 THE COURT: Well, I think the personal information
23 you should just redact and you can separately provide contact
24 information to the plaintiff's counsel, should they want it.

25 MR. HUESTON: Well, I do want all -- I do want

1 identifying information. Yes, Your Honor.

2 THE COURT: Yes. And you might think about, you
3 know, sort of a structured production where -- because it's
4 very hard to make this kind of determination in the dark.

5 MS. COOKE: Certainly. I raise it in part, Your
6 Honor, because of Mr. Hueston's expression of an interest in
7 getting these documents as quickly as possible, which I don't
8 disagree with, but understanding as well that there will be --
9 this information will appear repeatedly throughout the
10 detective's investigation, the IAB investigation, the district
11 attorney's investigation, so that the information, although I
12 might not have access to all of these documents at the same
13 time in the sequences we're talking about production, the
14 issue will arrive first and then it will be repeated.

15 MR. HUESTON: Your Honor, not to beat a dead horse,
16 but I need to say this.

17 What I said to Ms. Cooke yesterday, if you think
18 it's privileged, put it on a privilege log. Let me see your
19 legal basis for it and then I'll respond at that time. I think
20 that's the way to go, the quickest and most efficient manner.

21 THE COURT: Yes, I was acknowledging the party's
22 interests in -- both the plaintiffs and the defendants in
23 accessing and Mr. Hueston saying that we would want access to
24 these individuals for purposes of fact discovery and their
25 information and the like.

1 So recognizing that need and in some instances these
2 individual's names and information might not be available to
3 us elsewhere in discovery and then balancing that need in our
4 burden and our interest in protecting information as law
5 enforcement privilege.

6 I was trying to advance the ball and just say well,
7 let's just get to the point where we'll just agree that it's
8 attorney's eyes only with respect to the witnesses contact
9 information.

10 MR. HUESTON: Your Honor, in terms of contact
11 information, I mean, I'll look at it.

12 THE COURT: But it may be easier just to agree to
13 that without prejudice to --

14 MR. HUESTON: I'm fine with respect to contact
15 information. But what was articulated yesterday was that,
16 and maybe I didn't understand it, was that we don't want this
17 information to be disclosed. If there are witnesses John Doe,
18 I don't want you telling that to any person outside of the law
19 office or any investigator and that's the end of it. And I
20 think that's really what your position was right?

21 MS. COOKE: Well, I think definitionally what
22 attorney's eyes only would mean is for the attorney's use and
23 any person employed at their direction to investigate or
24 gather facts and so investigator's use. But not -- but that
25 this information wouldn't be shared to the -- yes -- that --

1 MR. HUESTON: I'd have to share with my clients.
2 There's no -- I represent plaintiffs and I've never agreed not
3 to share information involved in a case with my clients.

4 MS. COOKE: Well, we have entered into attorney's
5 eyes only stipulations with respect to witness's names and
6 identities and information at the Law Department in 1983
7 actions and issues.

8 MR. HUESTON: If there is something you could show
9 me, obviously, I will look at it, Ms. Cooke. But I don't --
10 you know, what you're saying -- there's no ongoing
11 investigation.

12 What you've suggested, there's going to be some sort
13 of witness intimidation, that's what you've suggested, and you
14 know, frankly speaking, I take exception with it.

15 In terms of giving me the contact information, I'll
16 accept the court's recommendation without waiving my right to
17 have the information disclosed in terms of the contact
18 information.

19 I intend on discussing every aspect of the case with
20 my clients. And unless there's some case law or something you
21 can show me to articulate that that somehow does not underpin
22 or undermine the fairness of these proceedings, you know, I
23 will oppose that.

24 THE COURT: Have you discussed with your client the
25 nature of the investigation you will be undertaking and

1 solicit your client's views about --

2 MR. HUESTON: We have, Your Honor.

3 THE COURT: -- whether witnesses might -- whether or
4 not there might be a need to protect the identity of
5 witnesses?

6 MR. HUESTON: Your Honor, Mr. Dunlop can speak more
7 to that, but I'll let you know just a couple of things.

8 Your Honor, we have been in contact with our clients
9 about the witnesses in this case throughout. We've known
10 about the district attorney's investigation throughout. We
11 know of a number of witnesses -- at least who we think are our
12 witnesses at this point. We know attorneys were walking
13 people into the district attorney's office.

14 And there's been -- as far as we know, nothing's
15 been articulated about any sort of witness intimidation. So
16 this is the first time I'm hearing about it, or a possibility,
17 as of yesterday.

18 MS. COOKE: Well, certainly to the extent that Mr.
19 Hueston has assessable to him the names and information of
20 witnesses with knowledge relevant to the case, those were not
21 included in his initial disclosure, so I assume that the
22 disclosures will be updated and that information will be
23 provided.

24 And certainly, to the extent the confidentiality
25 orders and attorney's eyes only protections often always state

1 that to the extent that the information was lawfully obtained
2 elsewhere it's obviously not -- it's not information that
3 would be covered by the umbrella of the stipulation of a
4 protective order.

5 So that would be my response to that, Your Honor.

6 MR. HUESTON: Well, I don't quite understand the
7 response, except to say --

8 THE COURT: Well, she's saying that the identity of
9 these witnesses may not be -- if they're not confidential
10 because you've already acquired --

11 MR. HUESTON: I don't know what witnesses she's
12 talking about, Your Honor.

13 THE COURT: No, no, no. But she's just saying if
14 you come forward with your list of witnesses, she may just
15 give up the ghost as to the witness that she's concerned
16 about.

17 MR. HUESTON: Your Honor, the City hasn't come up
18 with its list of witnesses at this point. They referred to
19 documents at this point.

20 THE COURT: Anyway --

21 MR. HUESTON: And we've referred to documents.

22 THE COURT: I think if you have a list of witnesses
23 -- and this is not actually -- I mean, this happens in -- I
24 had a bunch of terrorism bank cases where there was a big
25 dispute over who would take the first step in making the

1 disclosure, but if it's the plaintiffs that want to have
2 fuller access and wider ability to disclosure, it certainly
3 doesn't hurt for you to come forward and say we know all about
4 these potential witnesses, and perhaps we ought to have a
5 category in your initial disclosure that -- where you might
6 not be in the position to say that your claims will be
7 dependant on these witnesses, but just to disclose knowledge
8 of witnesses who may potentially have information.

9 And it doesn't hurt because once Ms. Cooke knows
10 that you're aware of the identity of certain persons, there's
11 less of a need to protect the identity of those persons.

12 And I'd be the first person to agree that sometimes
13 law enforcement people are overly protective of the
14 confidential -- I mean, overly protective of informers and
15 people providing information. I mean, you read a complaint
16 and you know who the informer is. I'd rather perish the
17 thought that they would run away from using the term CI.

18 MR. HUESTON: The point really I'm getting at, Your
19 Honor, is this. That throughout the course of the district
20 attorney's investigation, the district attorney met with the
21 family and apprised them of what was going on, I think on
22 maybe three or four occasions.

23 And during that time, they discussed that there were
24 witnesses. They asked lawyers to participate and so there was
25 no -- the witnesses that are in the district attorney's file

1 are witnesses that the district attorney literally said Mr.
2 Montgomery, Mr. Dunlop, you know, to the family, do you have
3 any information that you can provide. And in some instances
4 that information was provided, if it was available.

5 So in terms of intimidation, what I'm hearing -- and
6 that's really what I'm talking to, it's baseless.

7 MS. COOKE: Well, I think it would be helpful if Mr.
8 Hueston and the plaintiff's counsel could provide the City
9 with a list of individuals they're aware of who have
10 information relevant to the claims in this case, whether or
11 not you intend to rely on them as a 26(a)(1) disclosure is
12 different.

13 But because I think that that would potentially
14 narrow the universe of any individual witnesses who we have
15 concerns with law enforcement privilege over that identity and
16 information, which we do have concerns about presently. So I
17 think that that could get us forward.

18 And then to the extent that we could produce it
19 attorney's eyes -- the remaining individuals attorney's eyes
20 only as the --

21 MR. HUESTON: Your Honor, that's completely -- I
22 think it's completely wrong.

23 THE COURT: Mr. Hueston, just provide the list of
24 people because you may -- your list may cover everybody that
25 the defendant wants --

1 MR. HUESTON: Your Honor -- I'm going to have to
2 say though, Your Honor, I don't think that this is proper and
3 this is why I don't think it's proper.

4 They are obviously in possession of the names of
5 witnesses at the present time. She's had discussions with
6 them.

7 The City has not produced any list or any
8 individuals at this point. She's saying that there are people
9 with security concerns and threats. And she has not provided
10 it.

11 THE COURT: They will eventually have to. But it
12 doesn't hurt for you to take the first step and I'm asking you
13 and directing you to take the first step. Period.

14 MR. HUESTON: Your Honor, if I could just be heard
15 further. I think both sides should be directed to do it at
16 the same time, Your Honor. Why is that somehow a burden to
17 only -- each of us should share the same burden. And maybe --

18 THE COURT: Well, for one thing, the defendants will
19 be limited to what they can share by the documents, I would
20 think, and notes, unless you think there are other -- that
21 there are names embedded in the memories of some of the city
22 employees that would not be put in a document. So there's
23 already a way of preserving it. And you are going to get the
24 documents eventually.

25 So I am just trying to avoid unnecessary motion

1 practice, because it may very well be that you have a wide net
2 and that you already have the list.

3 I am going to ask Ms. Cooke to talk to the D.A.
4 about what the D.A. discussed with the family, because -- and
5 I'll ask her to share with Mr. Hueston what you were told.
6 Just come forward with the list.

7 MR. HUESTON: I understand this is not our witness
8 list. I understand that.

9 THE COURT: It's not your witness list.

10 MR. HUESTON: I understand that.

11 But I do think the City is -- I think they are in
12 possession of some of these names now, Your Honor. I don't
13 see why there should be any delay.

14 THE COURT: Because I want you to come up with your
15 names first because -- and I'm not suggesting that you will
16 necessarily have any reason -- I mean, if you want the names
17 and I make it attorney's eyes only, okay. But let's just
18 avoid the problem of any suggestiveness, vis-a-vis your
19 conversation with the plaintiff. Just go through and provide
20 a list.

21 Now let's take a step back then. Initial
22 disclosures, have they been exchanged --

23 MR. HUESTON: Yes.

24 THE COURT: So you will supplement initial
25 disclosures by providing a list of witnesses that you think

1 may have potentially relevant information.

2 So when can you do that?

3 (Counsel confer.)

4 THE COURT: Just give the names. Just give the
5 names.

6 MR. HUESTON: Ten days to get the names.

7 THE COURT: Okay. I'll give you two weeks. So that
8 will be the 30th.

9 MS. COOKE: And so then, Your Honor, we can
10 certainly revisit the issue of if the identity of any
11 additional witnesses that haven't been provided with this list
12 still remain and we have concerns about our --

13 THE COURT: And you have to make a showing.

14 MS. COOKE: Yes. We'll make a --

15 THE COURT: And you'll have to make a showing.

16 MS. COOKE: Making an application for showing --

17 THE COURT: And so that way you don't have to --
18 when you start your production have to worry about protecting
19 the identities of these individuals.

20 MS. COOKE: Correct. Correct.

21 THE COURT: But in any event, I think even though
22 5.2 on redaction is a little different from the privacy act
23 requirements in -- under the criminal rules, I think the
24 criminal rules ought to apply here and you'll redact
25 residences and telephone numbers.

1 MR. HUESTON: So the City will redact residences
2 and telephone numbers.

3 THE COURT: From the documents, but they'll provide
4 you that information.

5 MS. COOKE: Under a disclosure. Like a 26(a)(1)
6 disclosure.

7 THE COURT: Confidential disclosure.

8 MR. HUESTON: So that would be the 30th.

9 THE COURT: For the plaintiff.

10 Now back to the initial issue of the production. I
11 gather you haven't made any production?

12 MS. COOKE: We produced about 305 pages, Your Honor.
13 We've produced -- we categorized, and on our initial
14 disclosures we produced Mr. Mahnefah Gray's medical records
15 from King's County Hospital, the autopsy report of the Office
16 of the Chief Medical Examiner, the entire case file of that.

17 We produced the 8(a) report from Mr. Gray. The 8(a)
18 reports for the officers involved in the incident, the line of
19 duty reports for the officers involved, the complaint report
20 that was prepared for this incident and relevant portions of
21 the shooting officer's memo books, the three hospital care
22 reports.

23 THE COURT: Okay. All right. So it doesn't sound as
24 if you disclosed anything that relates to the investigation.

25 MS. COOKE: We didn't have -- at the time of -- on

1 August 27th, we didn't have any closed investigations. Now
2 about two weeks ago, or a week and a half ago, the IAB
3 investigations closed. We expect to receive that file today.

4 And the Kings County District Attorney's
5 investigation is closed and a request for that file -- they're
6 preparing it for us.

7 The 67 Detective Squad file is closed and we just
8 received a copy of that. The Firearms Discharge Review Board
9 investigation is open pending a review and decision, and as
10 soon as that happens, and I've made inquiries as to when,
11 because I thought that would be pretty promptly here. They
12 don't have a date yet, but I'm pushing them. And it should be
13 prompt, as that effects my decisional representation issues,
14 Your Honor. So I'm interested in moving it forward.

15 Then those reports and investigations of the
16 Firearms Discharge Review will be available and so everything
17 is moving.

18 THE COURT: Okay. Well, if things --

19 MR. HUESTON: Can we get a date though?

20 THE COURT: Wait. Just listen. You have to let me
21 finish. I'm sorry.

22 If there is a delay in the conclusion of the
23 investigation, as frequently happens with respect to police
24 investigations, I think you ought to look into disclosing the
25 underlying data even in the absence of the report. But we've

1 done that.

2 Because there's physical evidence that may have been
3 analyzed that's not necessarily -- that doesn't necessarily
4 need to be kept confidential.

5 MS. COOKE: Your Honor, I think it may be in fact
6 largely duplicative of (inaudible) that either are closed or
7 will be closed that we have presently. So --

8 THE COURT: Okay. So when can you make a
9 production?

10 MS. COOKE: I expect we'll -- with the 14 days for
11 the list of witnesses, our issue with an application -- but,
12 for example, the crime scene investigation materials that are
13 rolling in, that I don't expect to have issues with. I don't
14 expect to have issues with witnesses in there.

15 MR. HUESTON: I think it's just a matter of
16 redacting, reviewing and --

17 MS. COOKE: Producing. So I think, Your Honor, that
18 that's going to probably be the voluminous first roll out and
19 I expect we -- 21 days?

20 MR. HUESTON: Yes. I think that's fair.

21 MS. COOKE: Yes. 21 days. For that and anything
22 else we have ready with that. For example, I know we got -- I
23 think we requested the autopsy x-rays of those (inaudible)
24 reflecting some documents and any additional documents we
25 have.

1 THE COURT: Okay. So you'll produce the documents.

2 MR. HUESTON: Your Honor, may I inquire? What type
3 of redactions is the City contemplating?

4 MS. COOKE: Well, redactions for, if any, necessary,
5 you know, personal identifying information law enforcement
6 privilege work product. Any --

7 MR. HUESTON: Additional information privilege --

8 THE COURT: Other than the personal identifying
9 information of both witnesses and officers, the rest you'll
10 have to --

11 MS. COOKE: Yes. I mean --

12 THE COURT: The privilege log.

13 MS. COOKE: Yes, yes. With the crime scene
14 investigation materials and the ballistics reports. I mean, I
15 don't expect that there will be any, but we do have any
16 obligation to review it and ensure that.

17 So I mean I don't -- with those documents in
18 particular I don't expect that we would have much of anything.
19 But the other files we're talking about, the investigative
20 files, there might be more. And as Your Honor said, anything
21 other than those personal identifying information, we'd want
22 to redact we will.

23 THE COURT: Okay. I'll just include the redactions
24 in my order.

25 Now back to scheduling. Have amendments -- have all

1 the parties been identified that you want to bring in.

2 MR. HUESTON: The short answer is no, Your Honor.
3 We don't have the other -- besides the two police officers
4 that are here today we don't know really any other potential
5 police officers. So we don't have any of those reports.

6 THE COURT: Okay.

7 MR. HUESTON: So the answer is no.

8 THE COURT: Probably then mid-November.

9 MR. HUESTON: I think that makes sense.

10 THE COURT: So what? November 14.

11 MR. HUESTON: That's fine, Your Honor.

12 MS. COOKE: So that would be to amend and add
13 parties?

14 THE COURT: Okay. I think -- it's hard to say what
15 categories you're going to put these people under.

16 Do you think you could -- are there any categories
17 that you would consent to adding people? You know, because
18 usually, for instance, I mean, in a false arrest case the
19 City will agree to add -- amendment to add any officers
20 involved in the arrest --

21 MS. COOKE: I don't think that there's anything
22 that we could consent to at this point, Your Honor, because
23 the shooting officers have been identified and to the extent
24 that they have John Doe EMT's, they're going to identify and
25 produce the paperwork and the CAD report and the identities

1 of those EMT's who treated the victim on the scene and at the
2 hospital.

3 So to the extent that plaintiffs have other
4 potential City employees that they want to add to claims, I'm
5 not sure and I couldn't consent.

6 THE COURT: Okay. Well, let me -- okay. I would
7 encourage you to think about consenting as to certain
8 categories.

9 I would definitely tell you, Mr. Hueston, that this
10 is one of those cases where it reflects a -- once -- if you
11 do try to bring in new parties that you can't just assert in
12 each claim a claim against all defendants, because that's
13 probably not going to be appropriate.

14 MR. HUESTON: I think if you look at this
15 complaint, Your Honor, we did try to specific different
16 theories and we'll endeavor to do that.

17 THE COURT: Well, you may have different theories,
18 but you may sometimes have a claim against all the
19 defendants, but more often than not not and, I mean, you do
20 talk about -- in your first claim you do limit your
21 unreasonable force to identified officers.

22 MR. HUESTON: Yes, Your Honor.

23 THE COURT: But to the others you have a host of
24 other claims and they may be different. And particularly the
25 denial of medical care. You may not -- it may not make sense

1 to name officers as part of that claim.

2 Anyway, I do encourage both plaintiffs and
3 defendants to be more cautious in their pleadings. These
4 people, of course, do look at pleadings.

5 And I don't think we have time to dwell upon
6 appropriate defenses today, but as you know, it's a constant
7 complaint of mine that defendants have a litany of attorney -
8 - affirmative defenses and there ought to be a reason -- you
9 -- when you allege it, because you have an obligation under
10 Rule 11 too when you make defenses.

11 Defendants in 1983 cases though have been surpassed
12 by defendants in FLSA cases. So I generally get about 30
13 affirmative defenses in FLSA cases. I've been getting after
14 them.

15 Some of them are raised under statutes that were in
16 effect for only 18 months past the time period in question.
17 But somehow they managed to stay on the computers.

18 Anyway, so we'll try to be more concise in -- you
19 know, be precise in our pleadings and so before you make any
20 kind of application, you should check, confer with defendants
21 to see if there might be consent. You know, if there's a
22 failure to intervene claim and it's -- I guess there have
23 been a couple of cases where officers have been liable.

24 Anyway, try to see if you can avoid motion practice
25 and if you can't, make an application by the 14th. I'll

1 confer with Judge Brody whether or not she wants to handle it
2 with a pre-motion conference or -- whatever it is, we'll --
3 just read the minute entry carefully and I will -- it will
4 tell you what you need to do.

5 MS. COOKE: Okay. Your Honor, with respect to the
6 number of depositions.

7 THE COURT: Yes.

8 MS. COOKE: I expect that we will have overlapping
9 interests in certain depositions and -- but I do expect that
10 the total number of depositions might exceed ten and ten in
11 this case.

12 THE COURT: Yes.

13 MS. COOKE: And so you know, again, as we're
14 getting the documents it will be, you know, more certainty to
15 tell, but when I spoke to Mr. Hueston yesterday, I did
16 suggest 15 might be the number that the defendants would need
17 for their two party plaintiff -- on behalf of plaintiff's
18 estate and then I was -- you know, based on my expectation
19 that there might be up to 12 or 13 additional non-party
20 witnesses, again, there might be overlap. But I was looking
21 to seek 15 at this point.

22 MR. HUESTON: Your Honor, my response yesterday
23 was I don't -- if there are 15, there are 15 witnesses and
24 they can be articulated, I'm not going to oppose that, Your
25 Honor.

1 I'm a little bit in a deficit. I do think the City
2 has information that they're relying on that I can't really
3 respond to. So I'm --

4 THE COURT: Well, anyway, I understand what your
5 concern is. I do think, and I was expecting more than the
6 presumptive limit. So we'll start with 15 and -- for each
7 side. And that probably should cover the universe, but if
8 it's not enough, then come back to me.

9 I would like to think that before you engage in
10 depositions of non-parties that you would both exchange lists
11 and then figure out who you need -- whether or not there's an
12 efficient way of deposing individuals, because you may avoid
13 the need to depose certain individuals if you depose certain
14 others who may have better knowledge on a particular topic.

15 MR. HUESTON: So we'll exchange lists, Your Honor.

16 THE COURT: Before you begin --

17 MS. COOKE: Yes.

18 MR. HUESTON: Okay. Your Honor, if I can inquire,
19 too, and maybe the City can't answer this. Are these all
20 fact witnesses or -- I assume they're fact witnesses, people
21 who saw --

22 THE COURT: Yes. Yes.

23 MS. COOKE: Yes. They'd be non-defendants, non-
24 plaintiffs and civilians who would have known information and
25 seen information, or had information relevant to the claims

1 alleged.

2 MR. HUESTON: But -- Your Honor, I'm sorry to be
3 pushy about it, but relevant to the claims doesn't mean that
4 they were fact witnesses -- if the City knows this. Fact
5 witnesses to the shooting or -- and what happened in the
6 aftermath or are they witnesses speaking to some other issue.

7 THE COURT: They're going to have to identify what
8 -- I mean --

9 MS. COOKE: When I know them I will identify the
10 subject matters of their knowledge and relevance to the case
11 and --

12 THE COURT: You'll seasonably supplement your
13 initial disclosure. I'm not even requiring you to talk about
14 the testimony. I just want you to have so we can have as
15 broad a list of witnesses that won't be subject to the City's
16 concerns.

17 Okay. So I will expect, but I won't set a deadline
18 at this time, some sort of motion for a protective order.
19 Hopefully, it will be stipulated to, but if it's not then
20 we'll set a schedule.

21 I would suggest that if there is a need for a
22 motion for a contested protective order, you tell me the
23 proposed schedule for responses and then we'll set a hearing.

24 MS. COOKE: I expect that we'll be able to get to a
25 decision point on that, whether or not it requires the

1 assistance of the court, I'm not sure --

2 THE COURT: Well, shortly after you have to make
3 your disclosures.

4 MS. COOKE: Yes.

5 THE COURT: Or there might be a motion to -- I
6 mean, not disclosures, but the production of the files. And
7 that should very clearly help crystalize your views on this
8 issue.

9 Okay. I mean, if you think it might be useful, I'll
10 just set a conference in November, early November to get a
11 feel of where you are on this whole issue of confidentiality
12 and then we could even talk about amendment at that time.

13 MS. COOKE: Okay.

14 THE COURT: What do you think? It can be by
15 telephone.

16 MR. HUESTON: By phone is fine, Your Honor.

17 THE COURT: Okay.

18 MR. DiFIORE: If it could be after the first week
19 in November, Your Honor, because I have a trial that week.

20 MS. COOKE: Oh, we could do it the first week. I'm
21 available. So if -- if it works for everyone else.

22 THE COURT: Okay. The 5th, which is the day after
23 Election Day, at 10 o'clock?

24 MS. COOKE: That works.

25 THE COURT: Okay. And then if I could ask one of

you to be kind enough to make the arrangements.

MS. COOKE: Yes.

Thank you, Your Honor.

THE COURT: Okay.

MR. HUESTON: Thanks, Judge.

THE COURT: All right. Anything else?

MR. HUESTON: No. I think we've covered everything.

THE COURT: Yes. And then we can get caught up on what's happening.

MS. COOKE: Okay. Thank you.

MR. HUESTON: Thanks, Judge.

MR. DiFIORE: Thank you.

(Proceedings concluded at 12:30 p.m.)

I, CHRISTINE FIORE, Certified Electronic Court Reporter and Transcriber and court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Christine Fiore

September 23, 2014

Christine Fiore, CERT